



March 17, 2003

**Via Electronic Submission**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: Request for Permission to Correct False Statements by Birch Telecom, or in the Alternative for a Waiver of the Sunshine Period Prohibition to Correct the Record, in the *Triennial Review Proceeding*, CC Docket Nos. 01-338 and 96-98.**

Dear Ms. Dortch:

Pursuant to section 1.1204(a)(10), SBC Communications Inc. (SBC) respectfully requests permission to correct certain false statements in the above-referenced proceeding by Birch Telecom (Birch) regarding purported limits on Southwestern Bell Telephone's (SWBT) capacity to "port numbers" or cut lines over to CLECs for use with their own switches.<sup>1</sup> SBC further requests that Birch's false statement and its failure to correct that statement be referred to the Commission's Enforcement Bureau for investigation and appropriate action.

One of the key issues in the *Triennial Review* proceeding involved claims by Birch and other CLECs that they were impaired without access to unbundled local switching because of purported "operational" impairments, including supposed limits on ILECs' capacity to process

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<sup>1</sup> 47 C.F.R. § 1.1204(a)(10). In the alternative, if the Commission deems it necessary, SBC requests a waiver of the sunshine period prohibition, 47 C.F.R. § 1.1203, to correct the record in this proceeding. As discussed below, SBC focused on Birch's claims in February, after receiving inquiries from Commission staff regarding CLEC claims that SWBT purportedly limited the number of hot cuts it could perform per central office per hour. Consequently, SBC was unable to bring this matter to the Commission's attention before the sunshine period began. Good cause therefore exists for the Commission to waive the sunshine period prohibition to the extent necessary. *See* 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.").

orders for unbundled loops in mass market quantities. Based on the information available, it appears that the Commission based its decision regarding unbundled switching, at least in part, on these claims.

This letter concerns claims made by Birch in *ex partes* filed on December 9, 2002, and again on February 7, 2003, with respect to that issue. In those letters, Birch (with the PACE coalition in December) asserted that so-called “operational impairments” associated with the “hot cut” process, including purported limits on “porting numbers,” prevent CLECs from using their own switches to serve customers.<sup>2</sup> Specifically, Birch claimed that SWBT “has an aggregate porting limit of 10 numbers (e.g., 10 analog lines; 1 DS-1 trunk) per central office per hour (for ALL CLECs).”<sup>3</sup> Birch provided no citation or other support for this claim in its *ex partes*.

In fact, SBC has no such limits. Accordingly, on February 13, after Birch reiterated its claims, representatives of SWBT requested that Birch provide SWBT an explanation of and the basis for its claim.<sup>4</sup> SWBT sought to resolve this matter informally, and therefore initially made its request on a business-to-business basis through its wholesale account team. But, after Birch failed to offer any explanation of its claim, despite repeated requests that it do so,<sup>5</sup> SBC formally

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<sup>2</sup> Letter of Genevieve Morelli to Marlene Dortch, Secretary, FCC (December 9, 2002) (Morelli Letter); Notice of *Ex Parte* Presentation to Hon. Kathleen Abernathy by Dave Scott, President and CEO, and Greg Lawhon, Senior Vice President and General Counsel, Birch Telecom (February 7, 2003) (February *Ex Parte*).

<sup>3</sup> Morelli Letter, Attachment at 7 (emphasis in original); February *Ex Parte*, Attachment at 7 (emphasis in original).

<sup>4</sup> In February, SBC received inquiries from Commission staff regarding CLEC claims that SWBT purportedly limited the number of hot cuts it would or could perform per central office per hour, and then focused on Birch’s *ex partes*. Birch’s claims were in contrast to SBC’s submissions in this proceeding stating that “SBC does not cap the number of hot cuts it can or will perform.” See Letter of Jay Bennett to Ms. Marlene H. Dortch, Secretary, FCC, Attachment, page 6 (Dec. 18, 2002). SBC did not immediately request an explanation from Birch because SBC first internally re-verified that SWBT had no such limit on hot cuts, and that no one at SWBT had communicated such a limit to Birch.

<sup>5</sup> On February 13, 2003, Teresa Rentschler, a Birch Account representative for SWBT, called Deborah Jewell, a representative of Birch, to ask for the source of Birch’s claim. Ms. Jewell informed Ms. Rentschler that Rick Tidwell was responsible for drafting that section of Birch’s *ex parte*, and that she had left Mr. Tidwell a message regarding Ms. Rentschler’s request. On February 18, 2003, Ms. Rentschler again called Ms. Jewell because she had not received any response to her inquiry. Ms. Jewell stated that Mr. Tidwell was aware of SWBT’s request. Since no one from Birch supplied any further information to her, Ms. Rentschler sent two more e-mails (dated February 20 and 26) to Ms. Jewell asking for a response. On February 26, Ms. Jewell directed Ms. Rentschler to call or e-mail Mr. Tidwell directly, which she did via e-mail

requested that Birch provide an explanation for its claim or correct the record by March 10, 2003.<sup>6</sup>

On March 10, Jacob Farber, counsel to Birch, called me and said that Birch would be unable to respond to SBC's request that day, but would do so shortly. On March 11, Birch transmitted to SWBT's account team a draft letter from Mr. Farber in which Mr. Farber proposed to state that "Birch was told of this limitation [on the number of hot cuts SWBT purportedly would or could perform] by an employee of SBC" but that "it appears that no written record of the exchange was made at the time, so Birch is unable to provide an exact source." Mr. Farber further proposed to state that Birch possessed documentation of a limit "expressed by SBC in the context of a manual customer migration effort to convert existing Birch customers served by Birch's switch to service provided by SBC's switch via UNE-P," and that this conversion process is "analogous to that required for a coordinated hot-cut." Mr. Farber planned to transmit a copy of this letter to Marlene Dortch, Secretary, FCC, to "further clarify the record in CC Docket No. 01-338."

After receiving this letter, Mr. Farber and I discussed Birch's proposed "clarification." During that conversation, Mr. Farber specifically acknowledged that Birch could not identify whom at SBC purportedly said that SWBT had a limit on its ability to perform hot-cuts on a large scale basis, nor to whom at Birch this statement supposedly was made. I stated that, under the circumstances, Birch could not reasonably and unequivocally represent that "Birch was told of this limitation by an employee of SBC." I also stated that Birch's proposed reference to SWBT's "limitation" on migrations from Birch's switch to UNE-P not only was irrelevant, but misleading. I explained in this regard that the number of migrations SWBT agreed to perform as part of this conversion process was the result of negotiations between Birch and SWBT and simply represented the specific resources SWBT had agreed to devote to the specific project.<sup>7</sup> I further noted that SWBT nowhere had stated or implied that the "six account or six locations" commitment for that one project represented a limit on SWBT's capacity to perform hot cuts. Mr. Farber did not challenge my understanding of this limitation, but said that he believed it provided some context for Birch's statement.

SBC is unsure when or if Birch intends to correct the record in this proceeding. Nor does it know whether Birch intends to claim that the "six account or six location" commitment

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the same day. Although Ms. Rentschler requested that Mr. Tidwell reply to her request by February 28<sup>th</sup>, Mr. Tidwell never offered any explanation for Birch's claim.

<sup>6</sup> Letter from Christopher M. Heimann, General Attorney, SBC Communications Inc., to Genevieve Morelli, Kelly Drye & Warren (March 3, 2003), Attachment A.

<sup>7</sup> Birch requested special handling for those migrations. Because of the attention required to meet Birch's request, SWBT agreed to convert either six accounts or six locations per day for that particular migration project. SWBT did not, however, suggest that it could perform no more than "10 numbers (e.g., 10 analog lines; 1 DS-1 trunk) per central office per hour (for ALL CLECs)," as Birch claimed in its *ex parte*.

somehow supports Birch's earlier claim that SWBT has a 10-line limit on hot cuts. However, as the foregoing makes clear, Birch had no evidence or other support for its claim that SWBT had a 10-line limit on hot-cuts, and SWBT's one-time, negotiated project migrations is entirely beside the point.

It may well be too late to undo the damage caused by Birch's misrepresentations of material facts in the *Triennial Review* proceeding. The Commission has already ruled in that proceeding, and, in the process, it apparently gave credence to CLEC claims of operational impairment. Nevertheless, SBC asks the Commission to accept this letter in order to correct the record. The record should be clear that SBC has no set limits on the number of hot cuts it will perform or the number of telephone numbers it will port.

SBC also asks that the Commission refer this matter to the Enforcement Bureau for prompt and thorough investigation. Birch's representations regarding ILEC limits on hot-cuts were central to its claim of operational impairment for switching, which was a critical issue in the *Triennial Review* proceeding. Birch had an obligation to correct its material misrepresentation with respect to this critical issue, even without being prodded by SBC. The fact that it still has not done so should be of grave concern to the Commission.

If you have any questions, please contact me at 202-326-8909.

Respectfully Submitted,

**/s/ Christopher Heimann**

Attachments

cc: Dan Gonzalez  
William Maher  
Michelle Carey  
David Solomon  
Maureen Del Duca  
Jacob Farber



March 3, 2003

**Via First Class Mail**

Genevieve Morelli  
Kelly Drye & Warren LLP  
1200 19<sup>th</sup> Street, N.W.  
Suite 500  
Washington, D.C. 20036

**Re: Birch *Ex Parte* Presentations in CC Docket No. 01-338**

Dear Ms. Morelli:

On December 9, 2002, and again on February 7, 2003, Birch Telecom (Birch) filed *ex partes* with the Commission urging it to retain the unbundled network element platform (UNE-P).<sup>1</sup> In both those *ex partes*, Birch argued that so-called "operational impairments" associated with the "hot cut" process prevent CLECs from using their own switches to serve customers, including purported limits on "porting numbers." In particular, Birch claimed that Southwestern Bell Telephone (SWBT) "has an aggregate porting limit of 10 numbers (e.g., 10 analog lines; 1 DS-1 trunk) per central office per hour (for ALL CLECs)."<sup>2</sup> Birch provided no citation or other support for this claim, and, despite repeated requests for explanation by representatives of SWBT,<sup>3</sup> has steadfastly failed to provide SWBT any basis for its claim. Accordingly, SWBT

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<sup>1</sup> Letter of Genevieve Morelli to Marlene Dortch, Secretary, FCC (December 9, 2002) (Morelli Letter); Notice of *Ex Parte* Presentation to Hon. Kathleen Abernathy by Dave Scott, President and CEO, and Greg Lawhon, Senior Vice President and General Counsel, Birch Telecom (February 7, 2003) (February *Ex Parte*).

<sup>2</sup> Morelli Letter, Attachment at 7 (emphasis in original); February *Ex Parte*, Attachment at 7 (emphasis in original).

<sup>3</sup> On February 13, 2003, Teresa Rentschler, a Birch Account representative for SWBT, called Deborah Jewell, a representative of Birch, to ask for the source of Birch's claim. Ms. Jewell informed Ms. Rentschler that Rick Tidwell was responsible for drafting that section of Birch's *ex parte*, and that she had left Mr. Tidwell a message regarding Ms. Rentschler's request. On February 18, 2003, Ms. Rentschler again called Ms. Jewell because she had not received any response to her inquiry. Ms. Jewell stated that Mr. Tidwell was aware of SWBT's request. Since no one from Birch supplied any feedback to her, Ms. Rentschler sent two e-mails (dated February 20 and 26) to Ms. Jewell asking for a response. On February 26, Ms. Jewell directed Ms. Rentschler to call or e-mail Mr. Tidwell directly, which she did via e-mail the

respectfully requests that Birch provide it an explanation for this claim or to correct the record in the above-referenced proceeding no later than March 10, 2003. Absent such action, SWBT will be forced to refer this matter to the Commission's Enforcement Bureau for investigation.<sup>4</sup>

If you have any questions concerning the foregoing, please contact me at 202-326-8909.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Christopher M. Heimann', with a long horizontal flourish extending to the right.

Christopher M. Heimann  
General Attorney

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same day. Although Ms. Rentschler requested that Mr. Tidwell reply to her request by February 28<sup>th</sup>, Mr. Tidwell has not yet offered any explanation for Birch's claim.

<sup>4</sup> See 47 C.F.R. § 1.17.